

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

March 11, 2014 at 1:30 p.m.

1. [14-21501](#)-E-13 SALVADOR CORTEZ
MRB-1 Pro Se

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR IN-REM ORDER
2-25-14 [[11](#)]

BUTTE VISTA DEVELOPMENT, LP
VS.

Tentative Ruling: The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(2) Motion - No Opposition Filed

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (pro se) and Chapter 13 Trustee on February 25, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The court's decision is to grant the Motion for Relief From the Automatic Stay.

Butte Vista Development, L.P. ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 436 Cuppelo Drive, Williams, California (the "Property"). Movant has provided a request for judicial notice of Dckt. Nos. 1, 11-16, 17, and 29 in Case No. 13-36126-E-13C (a previous bankruptcy filed by the Debtor, "prior case") to introduce evidence upon which it bases the motion.

A review of motion for relief, supporting documents, and civil minutes, filed in the prior case shows that Movant purchased the subject property at a pre-petition Trustees Sale on September 26, 2013. Additionally, Movant established that the Debtor was at best tenant at sufferance, and that movant had commenced an unlawful detainer action in Colusa County Superior Court and received a Writ of Possession on December 16, 2013. Movant also provided an authenticated copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership and a copy of the Notice to Vacate issued by the Colusa County Sheriffs Office. The Chapter 13 Trustee filed a non-opposition to the motion in the prior case on January 24, 2014. See Dckt. Nos. 11-16, 27, and 29 in prior case. In the prior case, the court issued an order granting the motion on February 11, 2014. Dckt. No. 29. Movant therefore argues that the previous order is *res judicata* and should be given preclusive effect; the parties and property are identical.

A review of the docket for the prior case shows that the case was dismissed on February 21, 2014 upon the failure of the Debtor to pay filing fees after an Order to Show Cause was issued. Dckt. No. 34. The Debtor filed this new case on February 18, 2014.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the Debtor and the estate have no interest in the subject property, beyond a mere possessory interest, the subject property having been sold at a pre-petition Trustee's Sale. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Movant further argues that it is entitled to an *in-rem* order on the basis that the Debtor's successive bankruptcy filings are in bad faith. Though not particularly stated in the motion, Movant appears to be requesting relief pursuant to 11 U.S.C. § 362(d)(4)(B). In support of its motion Movant points out that:

1. The Debtor filed the present bankruptcy case "only days" after the court granted Movant's motion for relief from stay in the prior case.
2. The Debtor is violating 11 U.S.C. § 109(g)(1) by filing this bankruptcy case because the Debtor was a debtor in another bankruptcy case within the 180 days preceding the filing of this case, and that case was dismissed for willful failure to abide by the orders of the court.
3. The Debtor misrepresented the filing date of the prior case on his petition in this case.

A review of the docket in this case confirms that the Debtor misstated the date of filing for the prior case. The Debtor stated that the prior

case was filed on January 15, 2013, when in fact, it was filed on December 30, 2013. A review of the dockets from the present and prior cases likewise shows that the Debtor was a debtor under title 11 of the United States Code during the 50 days preceding the filing of the present petition, and that the prior case was dismissed because of the Debtor's failure to abide by the court's Order to Show Cause for Failure to Pay Filing Fees.

11 U.S.C. § 362(d)(4) allows the court to grant relief from stay where the court finds that the petition was filed as part of a scheme to delay, hinder or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of secured creditors or court approval or (ii) multiple bankruptcy cases affecting the property.

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 364(d)(4). Movant has provided sufficient evidence concerning a series of bankruptcy cases being filed with respect to the subject property. The court finds that the filing of the present petition works as part of a scheme to delay, hinder, or defraud Movant with respect to the Property by both the transfer of an interest in the property and the filing of multiple bankruptcy cases.

The court shall issue an order terminating and vacating the automatic stay to allow Butte Vista Development, L.P., and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 436 Cuppelo Drive, Williams, California, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by Butte Vista Development, L.P., having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Butte Vista Development, L.P., its agents, representatives, and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 436 Cuppelo Drive, Williams, California.

IT IS FURTHER ORDERED that relief is granted pursuant to 11 U.S.C. § 362(d)(4) with this order granting relief

from the stay, if recorded in compliance with applicable State laws governing notices of interests or liens in real property, shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except as ordered by the court in any subsequent case filed during that period.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause shown by Movant.

No other or additional relief is granted.

2. [14-20367](#)-E-13 BONNIE HOCK
RDN-1 John S. Sargetis

MOTION FOR RELIEF FROM
AUTOMATIC STAY
2-5-14 [19]

JPMORGAN CHASE BANK, N.A.
VS.

Tentative Ruling: The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 5, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The court's decision is to grant the Motion for Relief From the Automatic Stay.

JP Morgan Chase Bank, NA ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 6910 Tonzi Road, Ione, California and 6910 Tonzi Road, Garage Unit, Ione, California (the "Property"). The moving party has provided the Declaration of Randall D.

Naiman to introduce evidence as a basis for Movant's contention that Bonnie Sue Hock ("Debtor") does not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property; Movant has provided a certified copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership. Movant asserts it purchased the Property at a pre-petition Trustee's Sale on January 3, 2012. Based on the evidence presented, Debtor would be a tenant at sufferance. Movant seeks to commence an unlawful detainer action in California Superior Court.

The Chapter 13 Trustee filed a statement of non-opposition.

OPPOSITION

The Debtor filed an opposition to the motion arguing that the motion should be denied because the Debtors have a wrongful foreclosure action pending against the Movant in the Superior Court. A copy of the wrongful foreclosure complaint is filed with the opposition. FN.1. The crux of Debtors' argument is that they are entitled to a rescission of the deed of trust so that title is restored to their names, thereby annulling Movant's claim of ownership on which they base their motion. However, none of the exhibits have been properly authenticated and therefore, no admissible evidence has been presented in opposition to the motion.

FN.1. The opposing party filed the opposition/points and authorities and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Local Bankruptcy Rule 9004(a) and Revised Guidelines for the Preparation of Documents, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rules 9004(a), 9014-1(d)(1).

DISCUSSION

The only admissible evidence before the court is that Debtor has no interest in the subject Property. Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate, and the property is not necessary for any effective reorganization in this Chapter 13 case. 11 U.S.C. § 362(d)(2).

Additionally, the Debtor is seeking to use the automatic stay in lieu of obtaining an injunction in the State Court proceeding. The gravamen of the opposition is that the foreclosure was wrongful because the Debtor should have been granted a loan modification. It is also asserted that the notice of default misstated the amount necessary to cure the arrearage (which may be based on the dispute as to whether a loan modification should have been granted).

The Opposition goes further to state that the assignment of the Note which is secured by the deed of trust was void because it violated the "PSA." (Which is an undefined term in the Opposition.) It also asserts the Note and deed of trust are not properly endorsed and delivered to the trust.

As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief.

This court has allowed debtors to use the automatic stay in lieu of obtaining an injunction in the state court action, district court action, or adversary proceeding to determine the substantive rights of the parties. In part, this is based on a recognition that by the time a debtor is compelled to file bankruptcy, they lack the resources to obtain a preliminary injunction bond. However, in such situations the court has required debtors to deposit with the Chapter 13 Trustee the amount of each monthly payment due on the note if the foreclosure is rescinded. *In re De la Salle*, Bankr. E.D. Cal. 10-29678, Civil Minutes for Motion to Dismiss or Convert (DCN: MBB-1), Dckt. 230 (Bankr. E.D. Cal. 2011), affirm., *De la Salle v. U.S. Bank, N.A. (In re De la Salle)*, 461 B.R. 593 (B.A.P. 9th Cir. 2011). This becomes the self funding bond, which the court may then use for Federal Rule of Civil Procedure 60(c) damages if the injunctive relief was improper or the debtor can then use to pay the debt secured by the deed of trust. (As is well established, a deed of trust (interest in real property) is not extinguished by the transfer of a note. See *Cervantes v. Countrywide Home Loans, Inc. et. al.*, 656 F.3d 1034, 9th Cir. 2011); *Carpenter v. Longan*, 83 U.S. 271, 274 (1872); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170 (1932); Cal. Civ. Code §2936.

Here, the Debtor has not proposed creating such a fund to support the injunctive relief created by the automatic stay. Rather the Chapter 13 Plan provides for only a \$268.00 monthly payment from the Debtor for a period of 60 months. The payments will first be used to pay the Chapter 13 administrative expenses and then \$2,500.00 in Debtor's attorneys fees. No provision is made for payment of any creditor claims, except for a 3.00% dividend on \$356,502.00 in general unsecured claims. Plan, Dckt. 28. There are no additional provisions to the Chapter 13 Plan.

It appears from Schedules D and F that the Debtor has unilaterally disposed of the Chase Home Finance, LLC deed of trust securing the debt and from which it seeks to void the non-judicial foreclosure sale. As discussed by the Ninth Circuit Court of Appeals in *Cervantes* and this court in *De la Salle*, deeds of trust and other interests in real property do not just "disappear" because of a defect in how they are transferred. FN.1.

FN.1. Another issue arises for the Debtor. If the Debtor is able to avoid in state court the deed of trust, then it appears that such deed of trust is preserved for the benefit of the bankruptcy estate as a matter of federal law. 11 U.S.C. § 551, the avoiding powers arising under both state and federal law being granted to the trustee, debtor in possession or Chapter 13

debtor pursuant to 11 U.S.C. § 544. As such, the value of the property subject to deed of trust (which is superior to a claim of exemption) would then be available under a plan to pay creditors (which Debtors has stated to include Chase Home Finance, LLC).

This court is confident that the Superior Court in which the Debtor's action against JPMorgan Chase Bank, N.A. is pending, can fashion the appropriate injunctive relief. That court may waive the requirement of any injunction bond or tailor it to fit the circumstance. For this court, the Debtor has shown that she is not prosecuting a reorganization or rehabilitation of her finances through Chapter 13, but merely using it in lieu of seeking the proper injunctive relief from the court.

The court shall issue an order terminating and vacating the automatic stay to allow JP Morgan Chase Bank, NA, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 6910 Tonzi Road, Ione, California and 6910 Tonzi Road, Garage Unit, Ione, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

The Movant has alleged adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a) (3).

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by JP Morgan Chase Bank, NA having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow JP Morgan Chase Bank, NA and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 6910 Tonzi Road, Ione, California and 6910 Tonzi Road, Garage Unit, Ione.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a) (3), Federal Rules of Bankruptcy Procedure, is waived for cause shown by Movant.

No other or additional relief is granted.